United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1385

To be argued by
SHEILA GINSBERG

B
P/B S.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

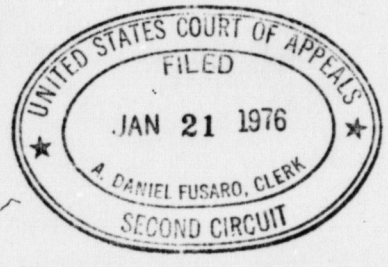
SHERMAN McDONALD,

Appellant.

Docket No. 75-1385

BRIEF FOR APPELLANT
PURSUANT TO
ANDERS v. CALIFORNIA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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QUESTION PRESENTED

Whether there are any non-frivolous issues which can be presented for this Court's review.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of conviction had after jury trial in the Eastern District of New York (The Honorable Orrin G. Judd) finding appellant guilty of possession with intent to distribute (Count 1) and importation (Count 2) of approximately one pound of cocaine in violation of 21 U.S.C. §841(a)(1) and 952(a). On November 14, 1975, appellant was sentenced to a concurrent five year term of imprisonment on each count to be followed by a five year period of special parole.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on the appeal pursuant to the Criminal Justice Act.

Statement of Facts

Appellant was charged in a two count indictment with possession intending to distribute (21 U.S.C. §841(a)(1)) and importing into the United States from a place outside thereof (21 U.S.C. §952(a)) approximately one pound of cocaine.*

The uncontested facts established at trial were that appellant was a crewman on the S.S. Santa Lucia, a ship which

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* The indictment is annexed as "B" to appellant's separate appendix.

was docked at the 39th Street Pier in Brooklyn on August 13, 1975 (35*). The Santa Lucia had just returned from a voyage which included in its itinerary stops in South America, Santo Domingo, and Aruba (79). At approximately 6:30 p.m., appellant attempted to leave the pier area through the truck exit thereby avoiding a customs search (38). At this juncture, he was observed by Harold Prettyman, the customs patrol officer who motioned to appellant to join the other crew men at the pedestrian gate (39). According to Prettyman, he noticed that appellant "looked bulky." A subsequent search of appellant revealed an elastic belt concealed under appellant's undershorts (39). The belt contained two separate packages wrapped in electrical tape (43, 45). The contents of the packages were not discernable from their exterior (43). Later investigation and further tests established that the packages contained cocaine (97,99).

When Prettyman first discovered the packages, appellant allegedly said, "You got me, give me a break." (39) Later, after being given his Miranda warnings (50, 114), appellant explained that a man he had never seen before approached him earlier that day, after the ship had docked, and asked him to bring this package through customs. He was instructed to deliver the package to a man wearing a red shirt who would be

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* Numberals in parenthesis are references to pages in the trial transcript.

waiting for him in a bar located one block from the pier.* Upon delivery, appellant was to get $200 (116). Appellant told the agents that he thought the packages contained marijuana (123).

Appellant testified in his own behalf. He is forty-five years old, married, the father of four children and he has no prior criminal record.** The only part of the Government's case contested by appellant was the assertion that he knew that the packages contained cocaine. Appellant maintained throughout, as he had in his post arrest statement, that he believed that he was smuggling marijuana (140). Appellant explained that while the man who had given him the packages had not told him what was in them, this man's initial question to appellant about whether he smoked marijuana led appellant to believe that the packages contained that substance (140).

The thrust of the defense was that since appellant did not know that the packages contained cocaine, he was not guilty of the crime charged. Over objections by both the defense (155) and the prosecution (161), the Judge charged *** the jurors that if they were to find that appellant believed

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* Federal agents went to the bar but found no one fitting this description (117).

** Appellant was once imprisoned for non-support (132).

*** The entire charge is annexed as "C" to appellant's separate appendix.

the packages contained marijuana, they must acquit on the cocaine charge (203) but they could then convict on the "lesser included offense of attempting to import marijuana (203, 204, 210-211). Toward that end a special verdict was submitted to the jury (210-211).

The Judge also charged on conscious avoidance of knowledge as follows:

> With respect to the count of importation, there are three elements. First that the substance was brought into the United States. Second that it was a controlled substance, cocaine in the terms of the charge in the indictment and third that the defendant knew it was cocaine or closed his eyes to the fact which should have made him aware of the fact that it was cocaine.
>
> (201)

> If you find from all the evidence that the defendant consciously tried to avoid learning that there was cocaine in the package he was carrying in order to be able to say, should he be apprehended, that he didn't know, you may treat this as a deliberate avoidance of positive knowledge. It is the equivalent of knowledge.
>
> (203)

After deliberation, the jury convicted appellant of possession with intent to distribute and importation of cocaine (3*).

Possible Legal Issues

I

One of the possible issues presented by this appeal is whether attempt to possess and import marijuana " are lesser

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* This reference is to page numbered 3 in the transcript dated October 8, 1975.

included offense within the charges of possession and importation of cocaine (Sansone v. United States, 380 U.S. 343 (1965)) and whether it was proper over defense objection to so instruct the jury (United States v. Harary, 457 F.2d 471 (2d Cir. 1972)). However, the record reveals that despite the possibility of error in this instruction, it could not have prejudiced the appellant in any way. The special verdict establishes that the jury rejected appellant's testimony that he believed that the packages contained marijuana. Therefore, the lesser included offense charge could not have encouraged the jury to compromise rather than acquit. United States v. Harary, supra, or allowed conviction for a crime not charged.

II

The charge on conscious avoidance of knowledge specifically provided that in order to establish knowledge, the jury had to find that appellant"closed his eyes to facts which should have made him aware of the fact that it was cocaine." This Court approved such a charge in United States v. Joly, 413 F.2d 672 (2d Cir. 1974).

CONCLUSION

For the foregoing reasons, there are no non-frivolous issues which may be raised on appeal for this Court's review. Accordingly, the motion pursuant to Anders v. California, 386 U.S. 738 (1967), should be granted and The Legal Aid Society, Federal Defender Services Unit, relieved as Mr. McDonald's counsel on appeal.

Respectfully submitted,

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January 21, 1976

CERTIFICATE OF SERVICE

January 21, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Sheila Ivsbery